July 2006

MJI Publications Updates

Adoption Proceedings Benchbook

Crime Victim Rights Manual (Revised Edition)

Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Third Edition)

Criminal Procedure Monograph 4—Felony Arraignments in District Court (Third Edition)

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Michigan Circuit Court Benchbook

Sexual Assault Benchbook

Traffic Benchbook—Third Edition, Volume 3

July 2006

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.1 "Father" Defined

D. Equitable Father

Insert the following case summary after the last paragraph in this subsection near the middle of page 76:

Identification of a child's equitable father precludes any later determination that the child was born out of wedlock; consequently, the child's mother has no standing to pursue a paternity action against any other man concerning that child. *Coble v Green*, ___ Mich App ___, ___ (2006) (a legal malpractice action involving the biological father of the child at issue in *York v Morofsky*, 225 Mich App 333 (1997)).

The *Coble* case arose when the equitable father (Morofsky) named in the *York* case failed to pay child support. *Coble, supra* at ___. The child's mother initiated a paternity action against the child's biological father (Coble) and the trial court ordered Coble to pay child support. *Id*. at ___. In disposing of Coble's malpractice action against the attorney who represented him in the paternity action, the Court reiterated the permanent and exclusive status of an individual determined to be the equitable parent of the child:

> "Because a court determination that a man is the equitable father of a child is mutually exclusive of a determination that the child was born out of wedlock, an equitable parentage order precludes the mother from having standing to assert a paternity action regarding that child." *Id*. at ___.

July 2006

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 5

Victim Privacy

5.4 Defense Discovery of Written or Recorded Statements by Victims

Exculpatory information or evidence.

Insert the following text before the last paragraph on page 84:

A defendant is entitled to disclosure of all exculpatory evidence, even when the evidence was made known only to a law enforcement officer and not to the prosecutor. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, a defendant was convicted of two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure. All charges arose from a single incident involving the defendant, three women, and the defendant's friend. The defendant's convictions were based

> "principally on the testimony of the three women that they were held captive by Youngblood and a friend of his, statements by [one of the women] that she was forced at gunpoint to perform oral sex on Youngblood, and evidence consistent with a claim by [the same victim] about disposal of certain physical evidence of their sexual encounter." *Youngblood, supra* at ___.

Several months after the defendant was sentenced, he learned that an investigator had discovered "new and exculpatory evidence" concerning his case. The evidence was

> "in the form of a graphically explicit note that both squarely contradicted the State's account of the incidents and directly supported Youngblood's consensual-sex defense. The note, apparently written by [two of the victims], taunted Youngblood and his friend for having been 'played' for fools, warned them that the girls had vandalized the house where Youngblood brought

them, and mockingly thanked Youngblood for performing oral sex on [the other victim]." *Youngblood, supra* at ___.

**Brady v Maryland*, 373 US 83 (1963).

Allegedly, the potentially exculpatory note had been given to an officer involved in investigating the defendant's case. The officer read the note, refused to take possession of it and told the individual who had given him the note to destroy it. The defendant claimed that failure to disclose the note was a *Brady** violation and moved to set aside the verdict. The trial court denied the defendant's motion and a divided Supreme Court of Appeals affirmed the trial court "without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." *Youngblood, supra* at ___. In its review of Youngblood's petition, the Court noted that "Youngblood clearly presented a federal constitutional *Brady* claim to the [West Virginia] Supreme Court." *Youngblood, supra* at ___. Because none of the West Virginia courts addressed the *Brady* issue, the United States Supreme Court vacated the West Virginia appellate court's judgment and remanded the case to obtain "the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue." *Youngblood, supra* at ___.

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text before the June 2005 update to page 264:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the defendant. In one of the cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape, on which McCottry identified the defendant as her assailant and gave the operator additional information about the defendant, was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon)*, *supra* at ___ (emphasis in original).

CHAPTER 10

Restitution

10.5 Ordering Restitution in Conjunction With Informal Juvenile Dispositions, Conditional Sentences, Delayed and Deferred Sentences, and Drug Treatment Court Participation

C. Restitution Ordered in Conjunction With Delayed and Deferred Sentences and Dispositions Under the Holmes Youthful Trainee Act

Insert the following text before the last paragraph in subsection (C) on page 318:

An individual is eligible for sentencing under the youthful trainee act for more than one offense. In *People v Giovannini*, ___ Mich App ___, ___ (2006), the Court of Appeals held that a "defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses." The Court explained: "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Id*. at ___.

July 2006

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Third Edition)

Part A—Commentary

2.5 Description of Property to be Seized

Insert the following text after the last paragraph on page 10:

In *People v Martin*, ___ Mich App ___, ___ (2006), the Court of Appeals cited *People v Zuccarini*, 172 Mich App 11 (1988), discussed above, in support of its ruling that warrants obtained to search several structures for evidence of prostitution and drug trafficking described with sufficient particularity the items to be seized. According to the *Martin* Court:

> "[T]he descriptions of the items to be seized from these three locations was sufficiently particularized. The search warrants authorized the search for equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the bar. This sentence is further qualified by the reference to the drug trafficking and prostitution activities that were thought to take place there. See *Zuccarini*, *supra* at 16 (noting that a reference to the illegal activities may constitute a sufficient limitation on the discretion of the searching officers). Thus, examining the description in a commonsense and realistic manner, it is clear that the officers' discretion was limited to searching for the identified classes of items that were connected to drug trafficking and prostitution activities at Legg's Lounge. *Id.* Hence, the search warrant provided reasonable guidance to the officers performing the search. [*People v*]*Fetterley*, [229 Mich App 511], 543 [(1998)]. Therefore, the search warrants met the particularity requirement." *Martin, supra* at ___.

Part A—Commentary

2.12 Executing the Search Warrant

Insert the following text after the block quote in the middle of page 25:

When law enforcement officers violate the knock-and-announce rule before executing a search warrant, application of the exclusionary rule is not the proper remedy. *Hudson v Michigan*, 547 US ___, ___ (2006).

In *Hudson*, police officers arrived at the defendant's home with a search warrant authorizing them to search for drugs and firearms. Outside the entrance to the defendant's home, the officers announced their presence and waited three to five seconds before entering the house through the unlocked front door. Officers found and seized both drugs and firearms from the home. The Michigan Court of Appeals, relying on Michigan Supreme Court precedent, ruled that application of the exclusionary rule is not the proper remedy when evidence is seized pursuant to a warrant but in violation of the knock-and-announce rule. *Hudson, supra* at ___.

The *Hudson* Court restated the three interests protected by the common-law knock-and-announce rule. First, compliance with the knock-and-announce rule protects the safety of the resident and the law enforcement officer because it minimizes the number of situations when "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Secondly, when law enforcement officers delay entry by knocking and announcing their presence, a resident is given the opportunity to cooperate with the officers "and to avoid the destruction of property occasioned by a forcible entry." Finally, when officers avoid a sudden entry into a resident's home, it protects a resident's dignity and privacy by affording the resident an opportunity "to collect oneself before answering the door." The Court found none of those interests present in this case:

> "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Hudson, supra* at ___ (emphasis in original).

The Court further supported its conclusion by referencing three of its own prior opinions. In *Segura v United States*, 468 US 796 (1984), the Court distinguished the effects of "an entry as illegal as can be" from the effects of the subsequent legal search and excluded only the evidence obtained as a result of the unlawful conduct. In *Segura*, the evidence at issue resulted from a legal search warrant based on information obtained while police officers occupied an apartment they had illegally entered. Because the warrant was not derived from the officers' initial entry, the Court did not exclude the evidence

seized under the warrant. As applied to the *Hudson* case, the Court noted that a different outcome in this case could not logically follow the disposition of *Segura.* According to the Court:

> "If the search in *Segura* could be 'wholly unrelated to the prior entry,' when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant. If the probable cause backing a warrant that was issued *later in time* could be an 'independent source' for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect." *Hudson, supra* at ___ (footnote and citations omitted, emphasis in original).

In *New York v Harris*, 495 US 14 (1990), the Court refused to exclude a defendant's incriminating statement when, although the defendant's statement resulted from his warrantless arrest and subsequent custodial interrogation, it "was not the fruit of the fact that the arrest was made in the house rather than someplace else." As for the *Harris* case's import on this case, the *Hudson* Court noted:

> "While acquisition of the gun and drugs [from Hudson's home] was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock and announce." *Hudson, supra* at ___ (footnote omitted.)

In *United States v Ramirez*, 523 US 65 (1998), the Court explained that whether the exclusionary rule applied in a specific case turned on whether there was a "sufficient causal relationship" between the Fourth Amendment violation and the evidence discovered during the course of events surrounding the violation. Said the *Hudson* Court with regard to the *Ramirez* case: "What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?" *Hudson, supra* at ___.

Part A—Commentary

2.14 Other Exceptions Applicable to Search Warrants

E. Exigent Circumstances Doctrine

Insert the following text after the June 2006 update to page 33:

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm, and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown*, ___ F3d ___, ___ (CA 6, 2006). In *Brown*, a police officer responded to a security alarm at the defendant's home and found the exterior basement door partly open. Thinking that the open door could mean that a burglary was in progress and concerned for his safety and that of others, the officer entered the basement to look for intruders. As he conducted a protective sweep of the basement, the officer noticed another door in the basement. To determine whether an intruder was hiding in the basement room, the officer approached the interior basement door. It, too, was slightly open. The officer testified that he noticed an odor of marijuana as he got closer to the door and "quickly pushed the door open in an attempt to catch anyone inside off guard." Using his flashlight in the dark room, the officer saw no one in the room. However, the officer did see that the room contained several marijuana plants and grow lights. Based on what the officer observed in the basement room, a search warrant was obtained and the contraband was seized. *Id*. at ___.

Because each decision the officer made to further investigate whether a burglary was in progress or an intruder was present in the basement was reasonable under the circumstances, the Court ruled that the officer's warrantless entry was lawful and that the officer's movements once inside the basement did not impermissibly exceed the scope of his lawful entry. *Brown, supra* at ___. The Court further held that, subject to its other requirements, the plain view doctrine authorized the seizure of any contraband the officer saw after he entered the basement. *Id*. at ___. Specifically, the Court noted the following:

> "In this case, [the officer] responded to a burglar alarm that he knew had been triggered twice in a relatively short period of time and arrived within just a few minutes of the first activation. He was not met by a resident of the house, but by [a] neighbor who directed him to the basement door. The sounding alarm, the lack of response from the house, and the absence of a car in the driveway made it less likely that this was an accidental activation. Investigating, [the officer] found the front door secured but the basement door in the back standing ajar. While [the officer] did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false

alarm but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through that same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement." *Id*. at ___.

Part A—Commentary

2.14 Other Exceptions Applicable to Search Warrants

H. Status of the Person Searched

Immediately before Section 2.15 on page 35, add a new subsection (H) as indicated above and insert the following text:

A suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US ___, ___ (2006). The *Samson* case involved a California statute* authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee.

*Michigan law authorizes a police officer to arrest without a warrant any probationer or parolee if the officer has reasonable cause to believe the person has violated a condition of probation or parole. MCL 764.15(1)(h).

The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson*, *supra* at ___ (footnote omitted). The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at ___.

July 2006

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Third Edition)

Part A—Commentary on Misdemeanor Arraignments

3.2 Jurisdiction and Venue in District Court

A. Jurisdiction

Insert the following text before subsection (B) on page 5:

Accessory after the fact. Because commission of the underlying crime is an element of any accessory after the fact charge, jurisdiction of such a charge is proper in the county where the underlying crime was committed, even when the actual assistance was rendered in a county different from the county in which the underlying crime occurred. *People v King*, ___ Mich App ___, ___ (2006). Similarly, even when the assistance was rendered in a state other than Michigan, jurisdiction to try a defendant charged with accessory after the fact lies in Michigan because "MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime where any act constituting an element of the crime is committed with Michigan." *King, supra* at ___.

July 2006

Update: Criminal Procedure Monograph 4—Felony Arraignments in District Court (Third Edition)

Part A—Commentary on Felony Arraignments

4.2 Jurisdiction and Venue

A. Jurisdiction

Insert the following text before subsection (B) on page 4:

Accessory after the fact. Because commission of the underlying crime is an element of any accessory after the fact charge, jurisdiction of such a charge is proper in the county where the underlying crime was committed, even when the actual assistance was rendered in a county different from the county in which the underlying crime occurred. *People v King*, ___ Mich App ___, ___ (2006). Similarly, even when the assistance was rendered in a state other than Michigan, jurisdiction to try a defendant charged with accessory after the fact lies in Michigan because "MCL 762.2(2)(a) provides that Michigan has jurisdiction over any crime where any act constituting an element of the crime is committed with Michigan." *King, supra* at ___.

July 2006

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Third Edition)

Part A—Commentary

5.30 Corpus Delicti Rule

Insert the following text on page 52 after the second paragraph in this section:

The *corpus delicti* rule for accessory after the fact is satisfied when the *corpus delicti* of the underlying crime is established. *People v King*, ___ Mich App ___, ___ (2006). Once the *corpus delicti* rule is satisfied with regard to the underlying crime, a defendant's confession to being an accessory after the fact to that crime may be admitted against that defendant without producing independent evidence of the defendant's assistance. *Id*. at ___.

July 2006

Update: Criminal Procedure Monograph 6—Pretrial Motions (Third Edition)

Part 2—Individual Motions

6.21 Motion to Compel Discovery

2. Information or Evidence That Must Be Disclosed by the Prosecuting Attorney

Insert the following text before the last paragraph on page 48:

Even when the evidence was made known only to a law enforcement officer and not to the prosecutor, a *Brady** violation may result from the failure to disclose the exculpatory evidence to the defendant. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, the defendant was convicted of sexual assault charges, a weapons charge, and indecent exposure. Months after the defendant was sentenced, a law enforcement officer was shown a potentially exculpatory note written by two victims of the crime. The officer refused to take the note and told the individual in possession of it to destroy it. The note's existence was not disclosed to the defendant, and the United States Supreme Court remanded the case to the West Virginia Supreme Court of Appeals for that court's "view" of the *Brady* issue the defendant raised in his motion to set aside the verdict. The Court did not decide the issue; instead, the Court conditioned its review of the merits on first having the West Virginia court consider the *Brady* issue. *Youngblood*, *supra* at ___.

**Brady v Maryland*, 373 US 83 (1963).

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy—Multiple Punishments for the Same Offense

Discussion

Insert the following text after the April 2006 update to page 62:

Where a conviction is predicated on conviction of an underlying felony and double jeopardy concerns mandate that the underlying felony conviction be vacated, an appellate court may reinstate the underlying felony conviction if the greater conviction is reversed on grounds affecting only the greater offense. *People v Joezell Williams*, ___ Mich ___, ___ (2006) (if defendant's felony-murder conviction was reversed on grounds affecting only the elements necessary to murder, an appellate court could reinstate the conviction for the underlying offense).

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of an Illegal Seizure of a Person

Discussion

Insert the following text on page 69 before the paragraph beginning "The Michigan Supreme Court has described . . .":

When law enforcement officers violate the knock-and-announce rule before executing a search warrant, application of the exclusionary rule is not the proper remedy. *Hudson v Michigan*, 547 US ___, ___ (2006).

In *Hudson*, police officers arrived at the defendant's home with a search warrant authorizing them to search for drugs and firearms. Outside the entrance to the defendant's home, the officers announced their presence and waited three to five seconds before entering the house through the unlocked front door. Officers found and seized both drugs and firearms from the home. The Michigan Court of Appeals, relying on Michigan Supreme Court precedent, ruled that application of the exclusionary rule is not the proper remedy when evidence is seized pursuant to a warrant but in violation of the knock-and-announce rule. *Hudson, supra* at ___.

The *Hudson* Court restated the three interests protected by the common-law knock-and-announce rule. First, compliance with the knock-and-announce rule protects the safety of the resident and the law enforcement officer because it minimizes the number of situations when "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Secondly, when law enforcement officers delay entry by knocking and announcing their presence, a resident is given the opportunity to cooperate with the officers "and to avoid the destruction of property occasioned by a forcible entry." Finally, when officers avoid a sudden entry into a resident's home, it protects a resident's dignity and privacy by affording the resident an opportunity "to collect oneself before answering the door." The Court found none of those interests present in this case:

> "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Hudson, supra* at ___ (emphasis in original).

The Court further supported its conclusion by referencing three of its own prior opinions. In *Segura v United States*, 468 US 796 (1984), the Court distinguished the effects of "an entry as illegal as can be" from the effects of the subsequent legal search and excluded only the evidence obtained as a

result of the unlawful conduct. In *Segura*, the evidence at issue resulted from a legal search warrant based on information obtained while police officers occupied an apartment they had illegally entered. Because the warrant was not derived from the officers' initial entry, the Court did not exclude the evidence seized under the warrant. As applied to the *Hudson* case, the Court noted that a different outcome in this case could not logically follow the disposition of *Segura.* According to the Court:

> "If the search in *Segura* could be 'wholly unrelated to the prior entry,' when the only entry was warrantless, it would be bizarre to treat more harshly the actions in this case, where the only entry was *with* a warrant. If the probable cause backing a warrant that was issued *later in time* could be an 'independent source' for a search that proceeded after the officers illegally entered and waited, a search warrant obtained *before* going in must have at least this much effect." *Hudson, supra* at ___ (footnote and citations omitted, emphasis in original).

In *New York v Harris*, 495 US 14 (1990), the Court refused to exclude a defendant's incriminating statement when, although the defendant's statement resulted from his warrantless arrest and subsequent custodial interrogation, it "was not the fruit of the fact that the arrest was made in the house rather than someplace else." As for the *Harris* case's import on this case, the *Hudson* Court noted:

> "While acquisition of the gun and drugs [from Hudson's home] was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock and announce." *Hudson, supra* at ___ (footnote omitted.)

In *United States v Ramirez*, 523 US 65 (1998), the Court explained that whether the exclusionary rule applied in a specific case turned on whether there was a "sufficient causal relationship" between the Fourth Amendment violation and the evidence discovered during the course of events surrounding the violation. Said the *Hudson* Court with regard to the *Ramirez* case: "What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?" *Hudson, supra* at ___.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

Discussion

Insert the following text before the last paragraph on page 100:

A suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US ___, ___ (2006). The *Samson* case involved a California statute* authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee.

*Michigan law authorizes a police officer to arrest without a warrant any probationer or parolee if the officer has reasonable cause to believe the person has violated a condition of probation or parole. MCL 764.15(1)(h).

The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson, supra* at ___ (footnote omitted). The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at ___.

Part 2—Individual Motions

6.43 Motion to Dismiss—Violation of 180-Day Rule

Discussion.

Delete the second and third sentences in the paragraph following the block quote of MCR 6.004(D) on page 118, and insert the following text before the partial paragraph at the bottom of that page:

*Overruled to the extent of its inconsistency with MCL 780.131.

In *People v Cleveland Williams*, ___ Mich ___, ___ (2006), the Michigan Supreme Court, contrary to *People v Smith*, 438 Mich 715 (1991),* ruled that MCL 780.131 "contains no exception for charges subject to consecutive sentencing." Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his right to a speedy trial. However, that the defendant in this case was entitled to raise the speedy trial issue did not end the Court's review of this case. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Cleveland Williams, supra* at ___.

**Hill* and *Castelli* were overruled to the extent of their inconsistency with MCL 780.131.

In addition to the defendant's speedy trial claim, the Court addressed specific case law that incorrectly interpreted the statutory language governing the notice required to trigger application of the statute. Contrary to *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963),* the Court noted that the statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Cleveland Williams, supra* at ___.

July 2006

Update: Criminal Procedure Monograph 7—Probation Revocation (Third Edition)

Part A—Commentary

7.29 Alternatives Following a Finding of Probation Violation

Insert the following text after the last full paragraph on page 27:

See *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order vacating the defendant's sentences, reiterating the Court's holding in *People v Hendrick*, 472 Mich 555, 560 (2005), and remanding the case to the trial court for resentencing. The order, in part, stated:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

Part A—Commentary

7.29 Alternatives Following a Finding of Probation Violation

Insert the following text on page 28 before the paragraph beginning, "Because the rule in *People v Hendrick* . . .":

See also *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order reiterating its holding in *People v Hendrick*, 472 Mich 555, 560 (2005), that a defendant's conduct following his or her initial order of probation (including conduct that led to probation revocation) may constitute a substantial and compelling reason to support a trial court's departure from the sentence range indicated under the guidelines. In the *Church* order, the Court noted that "[u]nder *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

July 2006

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

G. OV 6—Intent to Kill or Injure Another Individual

1. Special Instructions and Definitions

In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, beginning near the bottom of page 51 and continuing to the top of page 52, replace the **Note** with the following text:

> **Note:** A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan*, *supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

H. OV 7—Aggravated Physical Abuse

2. Case Law Under the Statutory Guidelines

Insert the following text on page 53 before the first paragraph in this sub-subsection:

Actual physical abuse is not necessary to score a defendant's conduct under OV 7. *People v Mattoon*, ___ Mich App ___, ___ (2006). In *Mattoon*, the defendant was convicted of various crimes related to an episode in which he held his girlfriend at gunpoint for nine hours. Apparently, no actual physical abuse was involved in the incident. Because the trial court concluded that actual physical abuse was required to score a defendant's conduct under OV 7, the court scored the offense variable at zero points. *Id*. at ___.

The *Mattoon* Court examined the plain language of MCL 777.37 (OV 7) and concluded that the Legislature did not intend that actual physical abuse be required to support an OV 7 score.* *Mattoon, supra* at ___. According to the Court:

> "While the label of OV 7 is 'aggravated physical abuse,' when the section is read as a whole, the Legislature does not require actual physical abuse in order for points to be assessed under this variable. Specifically, subsection (3) defines 'sadism' to mean 'conduct' that, among other things, subjects the victim to extreme or prolonged humiliation. While humiliation may have a physical component, there certainly does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well. If the Legislature intended to limit the applicability of OV 7 to cases where there is physical abuse, then instead of defining 'sadism' to be 'conduct' that produces pain or humiliation, it would have said 'physical abuse' that subjects the victim to pain or humiliation." *Id*. at ___.

*The Court noted that the OV 7 score in *People v Hornsby*, 251 Mich App 462 (2001), discussed below, was based on conduct involving no actual physical contact.

Part II—Scoring the Statutory Sentencing Guidelines

8.6 Scoring an Offender's Offense Variables (OVs)

M. OV 12—Contemporaneous Felonious Criminal Acts

2. Case Law Under the Statutory Guidelines

In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** on page 68 with the following text:

> **Note:** A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan*, *supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan*, *supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

Part V—The Sentencing Hearing

8.24 Crime Victim's Impact Statement

In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** beginning near the bottom of page 125 and continuing on page 126 with the following text:

> **Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant's sentence. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

Part VI—Fashioning an Appropriate Sentence

8.26 Scope and Objectives

In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** beginning near the bottom of page 127 and continuing on page 128, with the following text:

> **Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant's sentence. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

Part VI—Fashioning an Appropriate Sentence

8.26 Scope and Objectives

A. Intermediate Sanctions

Insert the following text on page 128 after the third paragraph in this subsection:

> **Note:** Whether a trial court may depart from the sentences indicated when an offender's OV and PRV levels place the offender in an intermediate sanction cell has not yet been decided by the Michigan Supreme Court. *People v McCuller*, 475 Mich ___, ___ (2006). In *McCuller*, this issue was before the Court but escaped review because the *McCuller* defendant was not entitled to an intermediate sanction once his offense variables were properly scored. *Id*. at ___.

Part VI—Fashioning an Appropriate Sentence

8.30 Additional Information to Consider Before Imposing Sentence

B. Improper Considerations

In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court determined that Michigan's sentencing scheme does not violate the Sixth Amendment. Therefore, replace the **Note** on page 146 with the following text:

> **Note:** A trial court may properly consider information not proved beyond a reasonable doubt when determining the length of a defendant's sentence. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

Part VIII—Specific Types of Sentences

8.43 Youthful Trainee Act—Deferred Adjudication

Insert the following text immediately before Section 8.44 at the bottom of page 191:

See also *People v Giovannini*, ___ Mich App ___, ___ (2006), where the Court of Appeals held that a "defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses." The Court explained: "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, *supra* at ___.

Part X—Selected Post-Sentencing Issues

8.53 Probation Revocation

Insert the following text before the last full paragraph on page 218:

See also *People v Church*, ___ Mich ___ (2006), where the Michigan Supreme Court reiterated its holding in *People v Hendrick*, 472 Mich 555, 560 (2005), that the statutory sentencing guidelines apply to sentences imposed after probation revocation. In *Church*, the Court issued a peremptory order vacating the sentences imposed on a defendant after his probation was revoked and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

Part X—Selected Post-Sentencing Issues

8.53 Probation Revocation

Insert the following text before the **Note** on page 220:

See also *People v Church*, ___ Mich ___ (2006), where the Michigan Supreme Court reiterated its holding in *People v Hendrick*, 472 Mich 555, 560 (2005), that the statutory sentencing guidelines apply to sentences imposed after probation revocation. In *Church*, the Court issued a peremptory order vacating the sentences imposed on a defendant after his probation was revoked and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

July 2006

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.2 Former Testimony or Statements of Unavailable Witness

A. Admissibility of Former Testimony Under MRE 804(b)(1)

Insert the following text before subsection (B) on page 164:

The content of a 911 call is not testimonial evidence and its admission at trial does not violate a defendant's Sixth Amendment right to confrontation. *Davis v Washington*, 547 US ___, ___ (2006).

In *Davis*, *supra*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during an assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. *Id*. at ___. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In a companion case, *Hammon v Indiana*, the *Davis* Court ruled that a victim's sworn statement regarding an assault was testimonial evidence and was not admissible at trial unless the victim's unavailability resulted from the defendant's wrongful conduct. *Davis (Hammon), supra* at ___.

In *Hammon, supra*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported

domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. *Id*. at ___. In this case, the Court concluded that the circumstances under which Amy was interrogated closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. *Davis (Hammon), supra* at ___. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Hammon's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon), supra* at ___ (emphasis in original).

CHAPTER 9

Statutory Firearms Restrictions In Domestic Violence Cases

9.4 Michigan Restrictions That Apply Upon Indictment on Felony or Misdemeanor Charges

C. Exemptions from Licensing Restrictions

Effective July 1, 2006, 2006 PA 75 amends MCL 28.432 to add additional circumstances under which the statutory licensing requirements in MCL 28.422 and MCL 28.429 do not apply. Insert the following text before the bulleted text on page 400:

> "(h)* Purchasing, owning, carrying, possessing, using, or transporting an antique firearm. As used in this subdivision, 'antique firearm' means that term as defined in section 231a of the Michigan penal code, 1931 PA 328, MCL 750.231a.
>
> "(i) An individual carrying, possessing, using, or transporting a pistol belonging to another individual, if the other individual's pistol is properly licensed and inspected under this act and the individual carrying, possessing, using, or transporting the pistol has obtained a license under section 5b to carry a concealed pistol."

*MCL 28.432(1)(h) was added by 2004 PA 99, effective May 13, 2004.

July 2006

Update: Juvenile Traffic Benchbook (Revised Edition)

CHAPTER 6

Elements of Selected Criminal Traffic Offenses

"Drunk Driving" Offenses

6.9 Section 625(1) and (8) Offenses—OWI

D.* Issues

*Relettered as "D" by the October 2005 update.

Insert the following text after the partial paragraph at the top of page 103:

In *People v Derror (Derror II)*, ___ Mich ___, ___ (2006), the Supreme Court clarified that its decision in *People v Schaefer*, 473 Mich 418 (2005), also applies in cases involving violations of MCL 257.625(8).

Said the *Derror* Court:

> "The plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated. MCL 257.625(8) does not require intoxication, impairment, or knowledge that one might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle. We thus clarify *Schaefer* and hold that, in prosecutions involving violations of subsection 8, the prosecution is not required to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated." *Id*. at ___.

In addition to its clarification of *Schaefer, supra*, the *Derror II* Court reversed the Court of Appeals decision in *People v Derror (On Reconsideration) (Derror I)*, 268 Mich App 67 (2005), and held that 11-carboxy-THC is a schedule 1 controlled substance. Therefore, delete the October 2005 update to page 103 and insert the following case summary:

The defendant in this case was the driver in a head-on collision that killed one person, paralyzed two more, and less-seriously injured another. *Derror II*, *supra* at ___. The defendant admitted smoking marijuana four hours before the accident, and blood tests taken shortly after the accident showed that the defendant had 11-carboxy-THC, a metabolite of THC, the psychoactive ingredient of marijuana, in her system at the time of the accident. *Id*. at ___. At trial, the court held that 11-carboxy-THC is not a schedule 1 substance, but that presence of the substance in the defendant's blood was admissible as circumstantial evidence to establish that the defendant had at some time ingested THC, which is a schedule 1 controlled substance *Id*. at ___. The defendant was convicted of operating a motor vehicle with the presence of a schedule 1 controlled substance in her body, causing death and serious injury (MCL 257.625(5). *Id*. at ___. The Court of Appeals affirmed the trial court's ruling that 11-carboxy-THC was not a schedule 1 controlled substance. *Derror II*, *supra* at ___. The Supreme Court, however, reversed this ruling. According to the Court:

> "Because 11-carboxy-THC qualifies as a derivative, and since derivatives are included within the definition of marijuana, which MCL 333.7212(1)(c) specifically lists as a schedule 1 controlled substance, we hold that 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212(1)(c) for the purpose of MCL 257.625(8)." *Derror II*, *supra* at ___.

July 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the April 2005 update to page 112:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which the defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the

defendant. In one of these cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon), supra* at ___ (emphasis in original).

CHAPTER 2
Evidence

Part IV—Hearsay (MRE Article VIII)

2.41 Statement of Co-Defendant or Co-Conspirator

A. Statement Made in Furtherance of Conspiracy

Foundation Requirements.

Insert the following case summary before the last paragraph on page 114:

Where a preponderance of the evidence has established an ongoing conspiracy, a co-conspirator's statement concerning a factor necessary to the continuance of the illegal conduct constitutes a statement made "in furtherance of the conspiracy." *People v Martin*, ___ Mich App ___, ___ (2006). In *Martin,* the defendant and his brother were charged with crimes arising out of their participation in the operation of an adult entertainment establishment. The charges arose out of the alleged performance of sex acts in a private VIP section of the establishment. *Id*. At trial, Angela Martin, the ex-wife of the defendant's brother, testified about certain statements she heard her ex-husband make, including his admission that sex acts were occurring at the establishment and that he and the other participants financially benefitted from the illegal activities. *Id*. Angela further testified that she overheard a telephone conversation between the defendant and her ex-husband regarding "the VIP cards necessary to access the downstairs area where acts of prostitution occurred." *Id*. The defendant was convicted, and on appeal argued that Angela's testimony regarding his brother's statements was inadmissible hearsay. *Id*.

The Court of Appeals noted that trial testimony given before Angela's testimony provided evidence sufficient to raise an inference that the defendant and his brother conspired to carry out the illegal objectives of maintaining the establishment as a house of prostitution, accepting earnings of prostitutes, and engaging in a pattern of racketeering activity. *Martin, supra* at ___. The Court further noted that the statements made by the defendant's brother and about which Angela testified were clearly made during the existence of the conspiracy and that because the conversation about the use of VIP cards clearly concerned the activities covered by the conspiracy, the statements were made in furtherance of the conspiracy. *Id*. Statements made to Angela regarding the financial compensation her ex-husband and defendant earned from the establishment were also made in furtherance of the conspiracy because the statements informed Angela of her collective stake in the success of the conspiracy and served to foster the trust and cohesiveness necessary to

keep Angela from interfering with the continued activities of the conspiracy. *Id*. Because the statements about which Angela testified were "statement[s] by a coconspirator... during the course and in furtherance of the conspiracy on independent proof of the conspiracy," the statements were properly admitted against the defendant at trial. *Id*.

B. Inculpatory Statements

Insert the following case summary after the first paragraph on page 115:

**Bruton v United States*, 391 US 123 (1968)

A *Bruton** error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006). Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Id*. at ___, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a codefendant's statement was improperly admitted at a joint trial, the other codefendant's statement may be considered to determine whether the error was harmless. *Id*. at ___.

In *Pipes*, the two defendants sought separate trials or separate juries based on their contention that their defenses were mutually exclusive. *Pipes, supra* at ___. To support their assertion that their defenses were mutually exclusive, both defendants made offers of proof and promised to testify at trial. *Id*. at ___. The trial court disagreed that the defendants' defenses were mutually exclusive and denied the motions for severance. *Id*. at ___. The court repeatedly indicated that no *Bruton* error would arise when the defendants' statements to police were admitted at trial because both defendants were going to testify. *Id*. at ___. According to the court, the defendants' statements to police were admissible in a joint trial because the codefendant who made the statement would be subject to cross-examination when he testified at trial. *Id*.

Multiple statements were admitted at the joint trial and both defendants decided not to testify—a clear *Bruton* error in violation of the defendants' Sixth Amendment right of confrontation. *Pipes, supra* at ___. Neither defendant objected and both defendants were convicted. *Id*. at ___. The Court of Appeals reversed on the basis of the *Bruton* error and its effect on the defendants' right to a fair trial. *Id*. at ___.

The Michigan Supreme Court reversed, noting that the Court of Appeals failed to identify whether the *Bruton* error was preserved or unpreserved and improperly reviewed the case under a harmless error analysis. *Pipes, supra* at ___. The proper standard of review in this case is the plain error analysis. According to the Court:

> "Because each defendant's own statements were self-incriminating, we cannot conclude that either defendant was

prejudiced to the point that reversal is required by the erroneous admission of his codefendant's incriminating statements. Each defendant individually admitted the territorial dispute with rival drug dealers, and each defendant's statements exposed the motive behind the homicidal shooting–retaliation for shooting the green Jeep Cherokee. In his second statement to the police, defendant Key explicitly admitted being the triggerman in the drive-by shooting and using an AK-47 rifle. Although Pipes did not confess to being the gunman, he admitted procuring a vehicle to transport defendant Key to the drive-by shooting and admitted following Key in the Jeep in order to 'watch [Key's] back.' Taken in isolation, these statements provide more than enough 'damaging evidence,' if believed by a jury, for the jury to find each defendant guilty beyond a reasonable doubt as a principal or as an aider or abettor of first-degree premeditated murder." *Id*. at ___ (footnote omitted).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

D. Judicial Review and Enforcement

Effective June 15, 2006, MCR 3.602 (I)–(N) were reinstated. Delete the May 2006 update to page 251. The last two paragraphs on page 251 should read as follows:

MCR 3.602 governs statutory arbitration under MCL 600.5001 through MCL 600.5035. A statutory arbitration award may be confirmed, modified, corrected, or vacated. "A reviewing court has three options when a party challenges an arbitration award: (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award." *Krist v Krist*, 246 Mich App 59, 67 (2001). MCR 3.602(I) governs the confirmation of an award. Although MCR 3.602(J)(3) provides the trial court may order a rehearing, the rule does not provide that the trial court may return the case to an arbitrator for reconsideration. Nor may the court return the matter to the arbitrator for an expansion of the record. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558 (2004).

An arbitration award may be vacated if (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded granted powers; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)(1). *Dohanyos v Detrex Corp*, 217 Mich App 171, 174–175 (1996); *Collins v Blue Cross and Blue Shield of Michigan*, 228 Mich App 560, 567 (1998).

CHAPTER 3

Civil Proceedings

Part VII—Rules Governing Particular Types of Actions (Including MCR Subchapters 3.300–3.600)

3.60 Arbitration

E. Timing

Effective June 15, 2006, MCR 3.602 (I)–(N) were reinstated. Delete the May 2006 update to page 252. The text in subsection (E) should read as follows:

The award must be confirmed within one year after the award is rendered. MCL 600.5021; MCR 3.602(I).

Attacks on the award must be brought within 21 days from delivery of a copy of the award to the applicant. If the attack is based on fraud, corruption or undue means, the attack must be brought within 21 days after such grounds are known or should have been known. MCR 3.602(J), (K).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

B. Foundation

Insert the following text after the last paragraph on page 298:

When the corpus delicti of the underlying crime is established, admission of a defendant's confession to being an accessory after the fact requires no independent evidence showing that the principal was assisted after committing the crime; "[T]he corpus delicti of accessory after the fact is the same as the corpus delicti of the underlying crime itself." *People v King*, ___ Mich App ___, ___ (2006).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Add the following text to the March 2005 update to page 316:

> **Note:** In *People v Joezell Williams*, ___ Mich ___ (2006), the Michigan Supreme Court affirmed the Court of Appeals decision in *People v [Joezell] Williams II*, 265 Mich App 68 (2005), the case discussed in the March 2005 update to page 316, but the Supreme Court declined the Court of Appeals' request to modify the decision in *People v Bigelow*, 229 Mich App 218 (1998).

Where a conviction is predicated on conviction of an underlying felony and double jeopardy concerns mandate that the underlying felony conviction be vacated, an appellate court may reinstate the underlying felony conviction if the greater conviction is reversed on grounds affecting only the greater offense. *People v Joezell Williams*, ___ Mich ___, ___ (2006) (if defendant's felony-murder conviction was later reversed on grounds affecting only the elements necessary to murder, an appellate court could reinstate the conviction for the underlying offense that had been vacated for double jeopardy reasons).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

C. Untried Charges Against State Prisoners—180-Day Rule

Replace the first two paragraphs after the numbered list on page 330 with the following text:

*Overruled to the extent of its inconsistency with MCL 780.131.

In *People v Cleveland Williams*, ___ Mich ___, ___ (2006), the Michigan Supreme Court, contrary to *People v Smith*, 438 Mich 715 (1991),* ruled that MCL 780.131 "contains no exception for charges subject to consecutive sentencing." Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his right to a speedy trial. However, that the defendant in this case was entitled to raise the speedy trial issue did not end the Court's review of this case. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Cleveland Williams, supra* at ___.

*_Hill_ and _Castelli_ were overruled to the extent of their inconsistency with MCL 780.131.

In addition to the defendant's speedy trial claim, the Court addressed specific case law that incorrectly interpreted the statutory language governing the notice required to trigger application of the statute. Contrary to *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963),* the Court noted that the statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Cleveland Williams, supra* at ___.

A community corrections center is a state correctional facility for purposes of the exception in MCL 780.131(2)(a). *People v McCullum*, 201 Mich App 463, 465–466 (1993).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

D. Where Did the Search Take Place?

7. Searches of Parolees or Probationers

Insert the following text after the existing paragraph on page 338:

A suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US ___, ___ (2006). The *Samson* case involved a California statute* authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee.

*Michigan law authorizes a police officer to arrest without a warrant any probationer or parolee if the officer has reasonable cause to believe the person has violated a condition of probation or parole. MCL 764.15(1)(h).

The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson, supra* at ___ (footnote omitted). The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

1. "Exigent Circumstances," "Emergency Doctrine," or "Hot Pursuit"

Insert the following text after the partial paragraph at the top of page 340:

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown*, ___ F3d ___, ___ (CA 6, 2006). According to the *Brown* Court:

> "In this case, [the officer] responded to a burglar alarm that he knew had been triggered twice in a relatively short period of time and arrived within just a few minutes of the first activation. He was not met by a resident of the house, but by the neighbor who directed him to the basement door. The sounding alarm, the lack of response from the house, and the absence of a car in the driveway made it less likely that this was an accidental activation. Investigating, [the officer] found the front door secured but the basement door in the back standing ajar. While [the officer] did not find a broken window or pry marks on the open door, it was objectively reasonable for him to believe that this was not a false alarm but, rather, that the system had recently been triggered by unauthorized entry through the open basement door. These circumstances, including the recently activated basement door alarm and evidence of a possible home invasion through that same door, establish probable cause to believe a burglary was in progress and justified the warrantless entry into the basement." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

C. Factors Involved in Dwelling Searches

1. Knock and Announce

Insert the following text before sub-subsection (2) on page 353:

When law enforcement officers violate the knock-and-announce rule before executing a search warrant, exclusion of any evidence seized is not the proper remedy. *Hudson v Michigan*, 547 US ___, ___ (2006).

The *Hudson* Court restated the three interests protected by the common-law knock-and-announce rule. First, compliance with the knock-and-announce rule protects the safety of the resident and the law enforcement officer because it minimizes the number of situations when "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Secondly, when law enforcement officers delay entry by knocking and announcing their presence, a resident is given the opportunity to cooperate with the officers "and to avoid the destruction of property occasioned by a forcible entry." Finally, when officers avoid a sudden entry into a resident's home, it protects a resident's dignity and privacy by affording the resident an opportunity "to collect oneself before answering the door." The Court found none of those interests present in this case:

> "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Hudson*, *supra* at ___ (emphasis in original).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.25 Search Warrants

D. Description

Insert the following text on page 359 before the last paragraph in this section:

In *People v Martin*, ___ Mich App ___, ___ (2006), the Court of Appeals cited *People v Zuccarini*, 172 Mich App 11 (1988), discussed above, in support of its ruling that warrants obtained to search several structures for evidence of prostitution and drug trafficking described with sufficient particularity the items to be seized. According to the *Martin* Court:

> "[T]he descriptions of the items to be seized from these three locations was sufficiently particularized. The search warrants authorized the search for equipment or written documentation used in the reproduction or storage of the activities and day-to-day operations of the bar. This sentence is further qualified by the reference to the drug trafficking and prostitution activities that were thought to take place there. See *Zuccarini*, *supra* at 16 (noting that a reference to the illegal activities may constitute a sufficient limitation on the discretion of the searching officers). Thus, examining the description in a commonsense and realistic manner, it is clear that the officers' discretion was limited to searching for the identified classes of items that were connected to drug trafficking and prostitution activities at Legg's Lounge. *Id.* Hence, the search warrant provided reasonable guidance to the officers performing the search. [*People v*]*Fetterley*, [229 Mich App 511], 543 [(1998)]. Therefore, the search warrants met the particularity requirement." *Martin, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

B. Scope of Discovery

Insert the following text after the first full paragraph on page 363:

A *Brady** violation may result from a failure to disclose exculpatory evidence to the defendant, even when the evidence was made known only to a law enforcement officer and not to the prosecutor. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, a case in which a potentially exculpatory note written by two victims of the crime was not disclosed to the defendant, the United States Supreme Court remanded the case to the West Virginia Supreme Court of Appeals for that court's "view" of the *Brady* issue raised by the defendant in his motion to set aside the verdict. The Court did not decide the issue; instead, the Court declined to review the merits of the case without first having the West Virginia court consider the *Brady* issue. *Youngblood*, *supra* at ___.

**Brady v Maryland*, 373 US 83 (1962).

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

F. Unavailable Witnesses

Insert the following text on page 383 after the first paragraph in this subsection:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the defendant. In one of the cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape, on which McCottry identified the defendant as her assailant and gave the operator additional information about the defendant, was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon), supra* at ___ (emphasis in original).

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the first paragraph at the top of page 415:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the declarant is unavailable and the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006).

5. Codefendant or Co-Conspirator Testimony

Insert the following text on page 415 after the second paragraph in this sub-subsection:

**Bruton v United States*, 391 US 123 (1968).

Even where the admission of a codefendant's statement at a joint trial violated *Bruton*,* the other codefendant's statement may be considered to determine whether the error was harmless. A *Bruton* error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006).

In *Pipes*, the two defendants sought separate trials or separate juries based on their contention that their defenses were mutually exclusive. *Pipes*, *supra* at ___. To support their assertion that their defenses were mutually exclusive, both defendants made offers of proof and promised to testify at trial. *Id*. The trial court disagreed and denied the motions for severance. *Id*. The court repeatedly indicated that no *Bruton* error would arise when the defendants' statements to police were admitted at trial because both defendants were going to testify. *Id*. According to the court, the defendants' statements to police were admissible in a joint trial because the codefendant who made the statement would be subject to cross-examination when he testified at trial. *Id*.

Multiple statements were admitted at the joint trial and both defendants decided not to testify—a clear *Bruton* error in violation of the defendants'

Sixth Amendment right of confrontation. *Pipes, supra* at ___. Neither defendant objected and both defendants were convicted. *Id*. The Court of Appeals reversed on the basis of the *Bruton* error and its effect on the defendants' right to a fair trial. *Id*.

The Michigan Supreme Court reversed, noting that the Court of Appeals failed to identify whether the *Bruton* error was preserved or unpreserved and improperly reviewed the case under a harmless error analysis. *Pipes, supra* at ___. The proper standard of review in this case is the plain error analysis. According to the Court:

> "Because each defendant's own statements were self-incriminating, we cannot conclude that either defendant was prejudiced to the point that reversal is required by the erroneous admission of his codefendant's incriminating statements. Each defendant individually admitted the territorial dispute with rival drug dealers, and each defendant's statements exposed the motive behind the homicidal shooting – retaliation for shooting the green Jeep Cherokee. In his second statement to the police, defendant Key explicitly admitted being the triggerman in the drive-by shooting and using an AK-47 rifle. Although Pipes did not confess to being the gunman, he admitted procuring a vehicle to transport defendant Key to the drive-by shooting and admitted following Key in the Jeep in order to 'watch [Key's] back.' Taken in isolation these statements provide more than enough 'damaging evidence.' if believed by a jury, for the jury to find each defendant guilty beyond a reasonable doubt as a principal or an aider or abettor of first-degree premeditated murder." *Id*.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

C. Standard of Review

Insert the following text before Section 4.42 near the middle of page 416:

**Bruton v United States*, 391 US 123 (1968).

A *Bruton** error is an error of constitutional magnitude subject to harmless error analysis; it does not require automatic reversal of a defendant's conviction. *People v Pipes*, ___ Mich ___, ___ (2006). Where a *Bruton* error is unpreserved, it is subject to review for "plain error that affected substantial rights." *Id.*, quoting *People v Carines*, 460 Mich 750, 774 (1999). Under this standard, even where a codefendant's statement was improperly admitted at a joint trial, the other codefendant's statement may be considered to determine whether it was harmless. *Pipes, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text on page 449 after the first paragraph in this subsection:

A trial court may properly consider information not proved beyond a reasonable doubt when scoring offense variables on which a defendant's sentence is based. *People v Drohan*, 475 Mich ___, ___ (2006). In *Drohan*, the Court reaffirmed its assertion in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that Michigan's sentencing scheme does not violate a defendant's Sixth Amendment right to be sentenced on the basis of facts determined by a jury beyond a reasonable doubt. *Drohan, supra* at ___. The *Drohan* Court's decision expressly states that *Blakely v Washington*, 542 US 296 (2004), *United States v Booker*, 543 US 220 (2005), and other post-*Blakely* cases do not apply to Michigan's indeterminate sentencing scheme. *Drohan, supra* at ___. According to the *Drohan* Court, Michigan's sentencing guidelines are not unconstitutional because trial courts do not use judicially ascertained facts to impose a sentence greater than the term authorized by the jury's verdict—the statutory maximum. *Id*. at ___. The Court explained, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Id*. at ___ (citations omitted).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the July 2005 update to page 450:

See also *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order vacating the defendant's sentences, reiterating the Court's holding in *People v Hendrick*, 472 Mich 555, 560 (2005), and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.56 Sentencing—Deferred, Delayed, and Diversionary

B. Holmes Youthful Trainee Act (HYTA)

Insert the following text before sub-subsection (1) at the bottom of page 458:

See *People v Giovannini*, ___ Mich App ___, ___ (2006), where the Court of Appeals held that a "defendant was not ineligible for sentencing under the [youthful trainee act] solely because he was convicted of two criminal offenses." The Court explained: "Interpreting MCL 762.11 to permit placement under the [youthful trainee act] only in cases involving a single offense would work contrary to the discretion invested in the trial court and to the overall purpose of the act." *Giovannini*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

E. Sentencing

Insert the following text after the July 2005 update to page 469:

See also *People v Church*, ___ Mich ___ (2006), a Michigan Supreme Court order vacating the defendant's sentences, reiterating the Court's holding in *People v Hendrick*, 472 Mich 555, 560 (2005), and remanding the case to the trial court for resentencing. The order, in part, stated the following:

> "The sentencing guidelines apply to sentences imposed after probation revocation. *People v Hendrick*, 472 Mich 555, 560 (2005). Defendant's minimum sentencing guidelines range is 7 to 23 months. The trial court did not articulate substantial and compelling reasons for imposing a minimum sentence of 40 months. On remand, the trial court shall sentence defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). Under *Hendrick*, *supra* at 564, the acts giving rise to the probation violation may provide a substantial and compelling reason to depart." *Church*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VII—Rules Governing Particular Types of Offenses

4.63 Aiding and Abetting

B. Elements

Insert the following text after the partial paragraph at the top of page 474:

However, "evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under [Michigan's] aiding and abetting statute." *People v Robinson*, ___ Mich ___, ___ (2006). The *Robinson* Court explained that the Legislature's abolition of the common-law distinction between principals and accessories did not eliminate the common-law theory of an accomplice's liability for the probable consequences of the crime committed. Therefore, a defendant who intends to aid and abet the commission of a crime is liable for that crime and for "the natural and probable consequences of that crime." *Id*. at ___.

In *Robinson*, the defendant was properly convicted of second-degree murder when the victim of an assault died as a result of injuries inflicted by the defendant's accomplice even where the defendant said "that's enough" and walked away from his accomplice and the victim before the victim was shot. *Id*. at ___. Evidence showed that the defendant drove his accomplice to the victim's home and intended to participate with his accomplice in assaulting the victim. Said the *Robinson* Court:

> "In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder." *Id*. at ___.

CHAPTER 4

Criminal Proceedings

Part VII—Rules Governing Particular Types of Offenses

4.65 Conspiracy

B. Elements

3. Statements of a Co-Conspirator

Insert the following text immediately before subsection (C) on page 477:

Where a preponderance of the evidence has established an ongoing conspiracy, a co-conspirator's statement concerning a factor necessary to the continuance of the illegal conduct constitutes a statement made "in furtherance of the conspiracy." *People v Martin*, ___ Mich App ___, ___ (2006) (statements included references to VIP cards issued for admission into private area where illegal activities occurred and to financial benefits received from those illegal activities).

July 2006

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.4 Aiding and Abetting

E. Pertinent Case Law

2. Specific Intent Crimes

Insert the following text before the **Note** on page 122:

However, "evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under [Michigan's] aiding and abetting statute." *People v Robinson*, ___ Mich ___, ___ (2006). The *Robinson* Court explained that the Legislature's abolition of the common-law distinction between principals and accessories did not eliminate the common-law theory of an accomplice's liability for the probable consequences of the crime committed. Therefore, a defendant who intends to aid and abet the commission of a crime is liable for that crime and for "the natural and probable consequences of that crime." *Id*. at ___.

In *Robinson*, the defendant was properly convicted of second-degree murder when the victim of an assault died as a result of injuries inflicted by the defendant's accomplice even where the defendant said "that's enough" and walked away from his accomplice and the victim before the victim was shot. *Id.* at ___. Evidence showed that the defendant drove his accomplice to the victim's home and intended to participate with his accomplice in assaulting the victim. Said the *Robinson* Court:

> "In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder." *Id*. at ___.

CHAPTER 5

Bond and Discovery

5.14 Discovery in Sexual Assault Cases

B. Discovery Rights

1. Generally

Insert the following text after the last paragraph on page 269:

**Brady v Maryland*, 373 US 83 (1963).

Even when the evidence was made known only to a law enforcement officer and not to the prosecutor, a *Brady** violation may result from the failure to disclose the exculpatory evidence to the defendant. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, the defendant was convicted of sexual assault charges, a weapons charge, and indecent exposure. Months after the defendant was sentenced, a law enforcement officer was shown a potentially exculpatory note written by two victims of the crime. The officer refused to take the note and told the individual in possession of it to destroy it. *Id*. at ___.

The defendant claimed that failure to disclose the note was a *Brady* violation and moved to set aside the verdict. The trial court denied the defendant's motion and a divided Supreme Court of Appeals affirmed the trial court "without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." *Youngblood, supra* at ___. In its review of Youngblood's petition, the United States Supreme Court noted that "Youngblood clearly presented a federal constitutional *Brady* claim to the [West Virginia] Supreme Court." *Youngblood, supra* at ___. Because none of the West Virginia courts addressed the *Brady* issue, the United States Supreme Court vacated the West Virginia appellate court's judgment and remanded the case to obtain "the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue." *Youngblood, supra* at ___.

CHAPTER 5
Bond and Discovery

5.14 Discovery in Sexual Assault Cases

D. Discovery Violations and Remedies

1. Violations

Insert the following text before the last full paragraph on page 278:

A defendant is entitled to disclosure of all exculpatory evidence, even when the evidence was made known only to a law enforcement officer and not to the prosecutor. *Youngblood v West Virginia*, 547 US ___, ___ (2006). In *Youngblood*, a case in which a potentially exculpatory note written by two victims of the crime was not disclosed to the defendant, the United States Supreme Court remanded the case to the West Virginia Supreme Court of Appeals for that court's "view" of the *Brady** issue raised by the defendant in his motion to set aside the verdict. The Court did not decide the issue; instead, the Court declined to review the merits of the case without first having the West Virginia court consider the *Brady* issue. *Youngblood, supra* at ___.

**Brady v Maryland*, 373 US 83 (1963).

In *Youngblood*, a defendant was convicted of two counts of sexual assault, two counts of brandishing a firearm, and one count of indecent exposure. All charges arose from a single incident involving the defendant, three women, and the defendant's friend. The defendant's convictions were based

> "principally on the testimony of the three women that they were held captive by Youngblood and a friend of his, statements by [one of the women] that she was forced at gunpoint to perform oral sex on Youngblood, and evidence consistent with a claim by [the same victim] about disposal of certain physical evidence of their sexual encounter." *Youngblood, supra* at ___.

Several months after the defendant was sentenced, he learned that an investigator had discovered "new and exculpatory evidence" concerning his case. The evidence was

> "in the form of a graphically explicit note that both squarely contradicted the State's account of the incidents and directly supported Youngblood's consensual-sex defense. The note, apparently written by [two of the victims], taunted Youngblood and his friend for having been 'played' for fools, warned them that the girls had vandalized the house where Youngblood brought them, and mockingly thanked Youngblood for performing oral sex on [the other victim]." *Youngblood, supra* at ___.

Allegedly, the note had been given to an officer involved in investigating the defendant's case. The officer read it but refused to take possession of the note and told the individual who had given him the note to destroy it. The defendant claimed that failure to disclose the note was a *Brady* violation and moved to set aside the verdict. The trial court denied the defendant's motion and a divided Supreme Court of Appeals affirmed the trial court "without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." *Youngblood, supra* at ___. In its review of Youngblood's petition, the United States Supreme Court noted that "Youngblood clearly presented a federal constitutional *Brady* claim to the [West Virginia] Supreme Court." *Youngblood, supra* at ___. Because none of the West Virginia courts addressed the *Brady* issue, the United States Supreme Court vacated the West Virginia appellate court's judgment and remanded the case to obtain "the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue." *Youngblood, supra* at ___.

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.4 Speedy Trial Rights

A. Defendant's Right to Speedy Trial

4. The 180-Day Rule for Defendants in Custody of Department of Corrections

Delete the second and third sentences in the paragraph following the January 2006 update to page 289. Insert the following text before the last paragraph on page 289:

In *People v Cleveland Williams*, ___ Mich ___, ___ (2006), the Michigan Supreme Court, contrary to *People v Smith*, 438 Mich 715 (1991),* ruled that MCL 780.131 "contains no exception for charges subject to consecutive sentencing." Consequently, unless specifically excepted under MCL 780.131(2), the 180-day rule applies to *any* untried charge against *any* prisoner, without regard to potential penalty. According to the Court, the plain language of MCL 780.131 permits a prisoner subject to mandatory consecutive sentencing to assert his right to a speedy trial. However, that the defendant in this case was entitled to raise the speedy trial issue did not end the Court's review of this case. After concluding that the defendant raised a valid claim under MCL 780.131, the Court considered the delay in bringing the defendant to trial and determined that the defendant's speedy trial rights had not been violated. *Cleveland Williams, supra* at ___.

*Overruled to the extent of its inconsistency with MCL 780.131.

In addition to the defendant's speedy trial claim, the Court addressed specific case law that incorrectly interpreted the statutory language governing the notice required to trigger application of the statute. Contrary to *People v Hill*, 402 Mich 272 (1978), and *People v Castelli*, 370 Mich 147 (1963),* the Court noted that the statutory time period of 180 days begins to run when the prosecution receives notice from the Department of Corrections:

*_Hill_ and _Castelli_ were overruled to the extent of their inconsistency with MCL 780.131.

> "The statutory trigger is notice to the prosecutor of the defendant's incarceration and a departmental request for final disposition of the pending charges. The statute does not trigger the running of the 180-day period when the Department of Corrections actually learns, much less should have learned, that criminal charges were pending against an incarcerated defendant." *Cleveland Williams, supra* at ___.

CHAPTER 7

General Evidence

7.3 Evidence of Other Crimes, Wrongs, or Acts

C. Admissibility of "Other-Acts" Evidence in Cases Involving Sexual Assault

Add the following text to the November 2004 update to page 338:

> **Note:** In *People v Drohan*, 475 Mich ___ (2006), the Michigan Supreme Court affirmed, on other grounds, the Court of Appeals decision discussed here (*People v Drohan,* 264 Mich App 77 (2004)).

CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the April 2004 update to page 364:

Whether hearsay evidence constitutes a "testimonial statement" barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v Washington*, 547 US ___, ___ (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis, supra* at ___ (footnote omitted).

Davis involved two separate cases (*Davis v Washington* and *Hammon v Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the defendant. In one of the cases, *Davis v Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator "interrogated" McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Davis, supra* at ___ (emphasis in original).

In the other case, *Hammon v Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a "reported domestic disturbance" call at the victim's home. Amy

summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford v Washington*, 541 US 36 (2004), and that the "battery affidavit" containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Davis (Hammon)*, *supra* at ___ (emphasis in original).

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Update: Traffic Benchbook—Third Edition, Volume 3

CHAPTER 1

Introduction to Vehicle Code §625 and §904

1.3 Definitions Commonly Used in §625 and §904 of the Vehicle Code

F. "Operating" a Vehicle

Insert the following text after the first paragraph near the bottom of page 9:

The Michigan Supreme Court considered the proper interpretation of the definition of "operate" in the Michigan Vehicle Code in *People v Yamat*, 475 Mich 49 (2006). The Court held that "the plain language of the statute requires only 'actual physical control,' not exclusive control of a vehicle." *Id.* at 51.

The *Yamat* case arose when the defendant, a front-seat passenger in another person's vehicle, grabbed the steering wheel and turned it without the driver's permission. *Yamat, supra* at 51. The defendant was charged with one count of felonious driving, but the district court refused to bind the defendant over for trial "because it concluded that the prosecution had not established that the statute proscribed defendant's conduct." *Id*. at 51–52. The circuit court affirmed this ruling, noting that the "defendant did not have *complete control* of the vehicle's movement." *Id*. at 52 (emphasis in original). The Court of Appeals also affirmed this ruling, holding that the defendant "was merely interfering with [the driver's] operation of the vehicle, but was not operating the vehicle himself." *Id*. The Michigan Supreme Court, however, reversed this ruling, finding that "the plain language of the statute requires only 'actual control,' not exclusive control," and that "[the] defendant's act of grabbing the steering wheel and thereby causing the car to veer off the road clearly constitute[d] 'actual physical control of a motor vehicle.'" *Id*. at 51, 57 (footnote ommitted).

CHAPTER 3

Section 625 Offenses

3.5 OWI or OWVI Causing Serious Impairment of a Body Function—§625(5)

B. Elements

4. The defendant's operation of the motor vehicle caused another person to suffer serious impairment of a body function.

Insert the following text after the October 2005 update to page 137:

In *People v Derror (Derror II)*, ___ Mich ___, ___ (2006), the Supreme Court clarified that its decision in *People v Schaefer*, 473 Mich 418 (2005), also applies in cases involving violations of MCL 257.625(5).

Said the *Derror II* Court with regard to MCL 257.625(5):

> "We ... agree that *Schaefer's* holding applies to subsections 4 and 5 alike. The Court of Appeals stated, and we agree, that no reason exists to interpret the identical language of MCL 257.625(5) differently from MCL 257.625(4)." *Derror II*, *supra* at ___.

CHAPTER 3

Section 625 Offenses

3.8 Operating With the Presence of Drugs—§625(8)

B. Elements

2. At the time the defendant operated the vehicle, "any amount of a controlled substance" was present in the defendant's body.

In *People v Derror (Derror II)*, ___ Mich ___, ___ (2006), the Supreme Court reversed the Court of Appeals decision in *People v Derror (On Reconsideration)(Derror I)*, 268 Mich App 67 (2005), and held that 11-carboxy-THC is a schedule 1 controlled substance. Therefore, delete the October 2005 update to page 148 and insert the following case summary in its place:

The defendant in this case was the driver in a head-on collision that killed one person, paralyzed two more, and less-seriously injured another. *Derror II, supra* at ___. The defendant admitted smoking marijuana four hours before the accident, and blood tests taken shortly after the accident showed that the defendant had 11-carboxy-THC, a metabolite of THC, the psychoactive ingredient of marijuana, in her system at the time of the accident. *Id*. at ___. At trial, the court held that 11-carboxy-THC is not a schedule 1 substance, but that presence of the substance in the defendant's blood was admissible as circumstantial evidence to establish that the defendant at some time ingested THC, which is a schedule 1 controlled substance. *Id*. at ___. The defendant was convicted of operating a motor vehicle with the presence of a schedule 1 controlled substance in her body, causing death and serious injury (MCL 257.625(5)). *Id*. at ___. The Court of Appeals affirmed the trial court's ruling that 11-carboxy-THC was not a schedule 1 substance. *Derror II, supra* at ___. The Supreme Court, however, reversed this ruling. According to the Court:

> "Because 11-carboxy-THC qualifies as a derivative, and since derivatives are included within the definition of marijuana, which MCL 333.7212(1)(c) specifically lists as a schedule 1 controlled substance, we hold that 11-carboxy-THC is a schedule 1 controlled substance under MCL 333.7212(1)(c) for the purpose of MCL 257.625(8)." *Derror II, supra* at ___.

In addition to its ruling regarding 11-carboxy-THC, the *Derror II* Court also clarified that its ruling in *People v Schaefer*, 473 Mich 418 (2005), also applies in cases involving violations of MCL 257.625(8). *Derror II, supra* at ___. In *Schaefer, supra*, the Court ruled that the causation element of MCL 257.625(4) requires only that a defendant's operation of a motor vehicle—not a defendant's operation of a vehicle as affected by the defendant's state of intoxication— be a factual and proximate cause of the harm resulting from the

*Other *Lardie* holdings were not disturbed by *Schaefer*. *Schaefer, supra* at 422 n 4.

statutory violation. *Schaefer, supra* at 446. In the consolidated cases decided in *Schaefer*, the Michigan Supreme Court overruled *People v Lardie*, 452 Mich 231 (1996), to the extent that *Lardie* concluded the statute required that a defendant's driving as affected by his or her intoxication be a substantial cause of the victim's death.* *Schaefer, supra* at 422, 433–34, 446.

The *Schaefer* Court explained:

> "The plain text of §625(4) does not require that the prosecution prove the defendant's intoxicated state affected his or her operation of the motor vehicle. Indeed, §625(4) requires no causal link at all between the defendant's intoxication and the victim's death....
>
> "Quite simply, by enacting §625(4), the Legislature intended to punish 'operating while intoxicated,' not 'operating in an intoxicated manner.'" *Schaefer, supra* at 422.

The *Schaefer* Court explained that the causation element of §625(4) must be construed "according to the actual text of the statute[:]"

> "Section 625(4) plainly requires that the victim's death be caused by the defendant's *operation* of the vehicle, not the defendant's *intoxicated* operation. Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as 'intoxicated' is a separate element of the offense used to identify the class of persons subject to liability under §625(4)." *Schaefer, supra* at 433 (emphasis in original).

A prosecuting attorney must prove that a defendant's operation of a motor vehicle was a factual cause of a victim's death: that "but for" the defendant's operation of the vehicle, the victim's death would not have occurred. A prosecuting attorney must also prove that the defendant's operation of the vehicle was a proximate cause of the victim's death: that the victim's death was a direct and natural result of the defendant's operation of the vehicle. It must also be determined that no intervening cause severed the causal link between the defendant's operation of the vehicle and the victim's death. An intervening cause is sufficient to sever that causal link if it was not reasonably foreseeable. An act of God or a victim's or third party's gross negligence or intentional conduct is generally unforeseeable and thus a sufficient intervening cause; ordinary negligence is foreseeable and thus not a sufficient intervening cause. *Id*. at 435–39.

The Michigan Supreme Court, in *Derror II, supra*, extended this reasoning to MCL 257.625(8). *Derror II, supra* at ___.

Said the *Derror II* Court with regard to MCL 257.625(8):

"The plain language of MCL 257.625(8) does not require the prosecution to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated. MCL 257.625(8) does not require intoxication, impairment, or knowledge that one might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle. We thus clarify *Schaefer* and hold that, in prosecutions involving violations of subsection 8, the prosecution is not required to prove beyond a reasonable doubt that a defendant knew he or she might be intoxicated." *Derror II*, *supra* at ___.

CHAPTER 7

Felony Offenses in the Motor Vehicle Code

7.10 Felonious Driving

E. Issues

In *People v Yamat*, 475 Mich 49, 51 (2006), the Supreme Court overturned the Court of Appeals' definition of the term "operate" as that term is used in the Michigan Vehicle Code, MCL 257.1 et seq. Replace the text in this subsection beginning with the partial paragraph at the bottom of page 209 and continuing through the block quote in the middle of page 210 with the following:

A defendant was operating a motor vehicle for purposes of MCL 275.626c when, while he was a front-seat passenger in another person's vehicle, the defendant grabbed the steering wheel and turned it without the driver's permission. *Yamat, supra* at 51. In reaching its decision, the *Yamat* Court held that "the plain language of [MCL 275.626c] requires only 'actual physical control,' not exclusive control of a vehicle." *Yamat, supra* at 51.

The Court explained:

> "Defendant was a passenger in the vehicle his girlfriend was driving. As she drove, the couple argued. During the argument, defendant grabbed the steering wheel and turned it. When the defendant wrenched the steering wheel, the vehicle veered off the road, struck a jogger and caused the jogger severe injuries.
>
> * * *
>
> "As applied to the facts of this case, defendant's act of grabbing the steering wheel and thereby causing the car to veer off the road clearly constitutes 'actual physical control of a motor vehicle.'" *Id.* at 51, 57.